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Supreme Court of the United States

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October Term, 1966

No. 1232

A. C. CAVELL, Superintendent,
State Correctional Institution,
Rockview, Bellefonte, Pennsylvania,
Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA
ex rel. CHARLES E. WHITING

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

A Writ of Certiorari is respectfully sought to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above-entitled case on March 3, 1966.

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TABLE OF CASES CITED

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OPINIONS BELOW

Court of Appeals—The opinion of the Court of Appeals has not yet been reported. It is reproduced in Appendix A to this Petition.

District Court—The opinion of the United States District Court is reported in 244 F. Supp. 560. It is included in the printed record in the Court of Appeals filed herewith.

Pennsylvania Supreme Court—The opinion of the Pennsylvania Supreme Court, affirming denial of habeas corpus, is reported in 414 Pa. 17, 198 A. 2d 568. It is included in the printed record in the Court of Appeals filed herewith.

Pennsylvania Supreme Court—The opinion of the Pennsylvania Supreme Court on direct appeal is reported in 409 Pa. 492, 187 A.2d, 563. It is included in the printed record in the Court of Appeals filed herewith.

JURISDICTION

The judgment of the Court of Appeals was entered on March 3, 1966. Petition for rehearing was filed March 16, 1966, and was denied on March 24, 1966. The jurisdiction of this Court is invoked under 28 U. S. Code, §1254(1).

QUESTIONS PRESENTED

I. When no objection is made to the introduction of evidence at a state trial in 1956, on post-trial motions, or on direct appeal, can such an objection be later raised in the Federal Courts on habeas corpus?

II. Was there an illegal search and seizure involved in this case, and, if so, should a new trial be granted wherein the evidence seized is excluded?

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the Constitution of the United States provides as follows:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no Warrant shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE

Charles Edward Whiting was convicted in 1956 by a jury of first-degree murder and sentenced to life imprisonment. His conviction was affirmed by the Supreme Court of Pennsylvania: *Commonwealth v. Whiting*, 409 Pa. 492, 187 A.2d 563 (1963). Thereafter, he filed two petitions for habeas corpus which were denied by the Court of Common Pleas of Montgomery County and one of which was affirmed by the Supreme Court of Pennsylvania: *Commonwealth ex rel. Whiting v. Rundle*, 414 Pa. 17 (1964). A prior petition in the United States District Court, No. 590 Habeas Corpus, was denied on the ground of failure to exhaust state remedies. On this petition, No. 630 Habeas Corpus, the writ was granted on the issue of search and seizure.

The evidence upon which Charles Edward Whiting was convicted may be summarized as follows:

Juan Otero operated a tailor shop at 56 East Spring Avenue, Ardmore, Pennsylvania, and lived in a small connecting apartment in the rear thereof. Shortly after 9:15 P.M. o'clock on June 14, 1956, Mrs. Isabel Strickland, who lived in an apartment above, heard sounds of a quarrel, scuffling and screams emanating from the apartment connected with the tailor shop below. She went to her bedroom

window overlooking a rear entrance leading from the tailor shop premises to an alley, and saw a colored man, whom she did not recognize, start out of the Otero apartment and then immediately re-enter. It was dark and she could not see his face. Within seconds, the same individual came out again. He was dressed in a light "T" shirt, dark trousers, light baseball cap, and carried a paper clothing bag. Immediately alerting neighbors, Mrs. Strickland, together with the neighbors, hurried to the Otero premises and saw Juan Otero lying on the floor of the kitchen in a pool of blood. No one else was on the premises. Mrs. Strickland called the police at exactly 9:28 P.M. They arrived within minutes and found the victim dead as a result of six (6) stab wounds in his body. Otero had been seen alive by another neighbor about 9:00 P.M., standing in front of his tailor shop.

Within minutes thereafter, Mrs. Strickland went by automobile to the home of her family, three blocks away. After a very brief stop, she started home and en route saw a colored man of the same build and appearance as the man she saw leaving the Otero premises. He was walking along the street about a block and one-half from the scene of the killing, still wearing the same type of clothing de-described, but was not carrying a bag. She reported this fact to the police. At first, when she saw the individual she could not remember his name, but shortly afterwards realized it was Charles Edward Whiting, and she told the police. He was taken into custody and questioned about the killing early the next morning. A search of the room where he lived revealed a white "T" shirt, dark trousers, shorts, a military fatigue cap, and a paper clothing bag. Blood spots and blotches of blood were readily discernible on each of the items of clothing and on the clothing bag. The defendant admitted wearing this clothing on the night before.

In midmorning of June 15th, the defendant gave a statement to the police wherein he stated that he had been

in the Otero shop between 7:30 and 8:00 o'clock P.M., the night before to pick up some clothes previously left for attention. He said that he received his clothes, departed and did not return. Subsequently, he learned about the assault upon Otero and watched from nearby as the police placed the victim's body in the ambulance.

Later on the same day, Whiting gave another statement to the police, which was substantially different from the one previously given. Therein, he said he went to the tailor shop at 7:30 P.M., paid for his clothing but decided to leave it there until he was going home. He returned to the shop about 9:30 P.M., saw the body of the victim lying on the floor in a pool of blood. He knelt alongside the body, rolled it over, jumped up shaking the blood off his hand, grabbed his clothes and ran out of the rear entrance. He explained his unusual actions as being due to fright and emotional disturbance based upon his recollection of a similar experience while serving in the armed forces during the Korean War.

Laboratory tests disclosed that the specimens of blood found on the clothing and bag found in Whiting's room were the same blood type as that of the victim and of a type different from that of Whiting.

Pursuant to Whiting's petition for habeas corpus alleging, inter alia, illegal search and seizure of the blood-stained clothing, a hearing * was held which disclosed the following:

Petitioner testified that at 7:50 A.M. on June 15th, 1956, about six hours after he was identified by Mrs. Strickland as the man she saw leaving the tailor shop, he was taken into custody by a policeman at the corner of Spring Avenue and Simpson Road, Ardmore, Pennsylvania, one-half block from the scene of the murder. There was no warrant for his arrest, but its validity is conceded. He was taken four blocks in a patrol car to meet Captain Shaffer

* References to testimony at hearing are designated (N.H.). References to testimony at trial are designated (N.T.).

of the Ardmore Police. He was put in Captain Shaffer's car and asked where he lived and where he stayed the night before. He gave his residence as Media, Pennsylvania. He had established this residence, a room in the house of his fiancee's mother, about four months prior to the murder.† The police took him, in handcuffs, about ten miles to Media, where they arrived about one-half hour after his arrest. Without a warrant, they searched his room and found clothing, and other articles, except socks, which Whiting was wearing or had with him the night before. The shoes Whiting was wearing at this time were apparently the same shoes he had worn the previous night and they were taken from him at this time.

The clothing was spotted with blood. No objection was made by Whiting to the search of the room. A few hours after Whiting was taken away for questioning, the police returned to his room accompanied by his fiancee, Hazel Smith, who had shared the room with Whiting and who had also been arrested. They asked her to search for his socks. She found them and they were used as evidence at the trial. This evidence was introduced at the trial, and admitted without objection (N.T. 193). No objection was made in post-trial motions or on direct appeal to the Pennsylvania Supreme Court.

The United States District Court for the Middle District of Pennsylvania, in an Opinion by the Honorable Michael H. Sheridan, dated June 30, 1965, found the search and seizure to be unreasonable, prejudicial and in violation of Charles Edward Whiting's Constitutional Rights.

An appeal was taken by the Commonwealth to the United States Court of Appeals for the Third Circuit, and that Court affirmed the lower court decision, on March 3, 1966.

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† The Lower Court Opinion says "four weeks" (p. 7, line 21). Petitioner testified it was about "four months" (N.H. 19). Hazel Smith testified at the trial: "He started living at my mother's home steady about three weeks prior to June 14th." (N.T. 464).

REASONS FOR GRANTING THE WRIT

I.

This Case Clearly Presents the Question of the State's Right to Insist on Compliance with Its Procedural Rules

As noted in the *Statement of the Case*, no objection was made at trial in 1956 to the introduction of the blood stained clothing into evidence (N.T. 193).

This question was recently presented to this Court in *Henry v. Mississippi*, 379 U.S. 443 (1965), which also involved the matter of search and seizure. There the Court said, at page 447-449 (emphasis supplied):

> "These cases settle the proposition that a litigant's procedural defaults in state proceedings do not prevent vindication of his federal rights *unless the State's insistence on compliance with its procedural rule serves a legitimate state interest.* In every case we must inquire whether the enforcement of a procedural forfeiture serves such a state interest. If it does not, the state procedural rule ought not to be permitted to bar vindication of important federal rights. *The Mississippi rule requiring contemporaneous objection to the introduction of illegal evidence clearly does serve a legitimate state interest.* By immediately apprising the trial judge of the objection, counsel gives the court the opportunity to conduct the trial without using the tainted evidence. If the objection is well taken the fruits of the illegal search may be excluded from jury consideration, and a reversal and new trial avoided."

We are confronted with the same rule of contemporaneous objection as in the *Henry* case. However, there an objection was made in the form of a motion at the close of the State's evidence asking for a directed verdict because of the erroneous admission of the officer's testimony. In the

Whiting case there was *no objection made at trial, in post-trial motions, or on direct appeal.*

Because of the procedural situation in the *Henry* case, this Court said, at page 449:

> "In these circumstances, the delay until the close of the State's case in presenting the objection cannot be said to have frustrated the State's interest in avoiding delay and waste of time in the disposition of the case."

The question then arose whether the decision of defense counsel not to make contemporaneous objection was for purposes of strategy and, therefore, whether there was a "waiver" of federal constitutional rights.

II.

Henry v. Mississippi Leaves Unanswered Many Questions Concerning "Waiver" of Constitutional Rights

The factual situation faced by the Court in *Henry v. Mississippi* necessarily led to the question of whether there was a "waiver" by counsel for strategic purposes. "Waiver" has been defined, under certain circumstances, as "a voluntary relinquishment of a known right". Neither Whiting nor his attorney could have "known" of the right to object in 1965 to the evidence, except by way of anticipation of *Mapp v. Ohio.* The question remains, however, whether Whiting lost his rights by inaction, or, conversely, whether the Commonwealth of Pennsylvania may insist on compliance with its procedural rule.

Here, in effect, we have the situation where Whiting says that the police should have anticipated *Mapp v. Ohio* and secured a search warrant, whereas he and his attorney should be excused for failure to so anticipate a later ruling.

Were it not for the fact that the direct appeal from the conviction was pending for seven (7) years before the Pennsylvania Supreme Court, due to continuances granted on application of the defendant, this case would have been "final" prior to the *Mapp* judgment on June 19, 1961.

H. Lester Haws, Esquire, trial counsel for Charles Edward Whiting, is now deceased. Therefore, there is no possible way of determining whether defense counsel ever discussed with the defendant the possibility of objection to the evidence. Furthermore, other questions arise. For example, is there any obligation on the part of defense counsel to discuss such questions as objection to evidence? What is the extent of the right and obligation of counsel to try a case in the manner in which he sees fit, rather than at the direction of his client?

The Pennsylvania Supreme Court and the United States Court of Appeals for several circuits have recognized and followed *Henry v. Mississippi*, as they interpret it. However in this case the United States Court of Appeals for the Third Circuit completely ignores this decision.

Conclusion

To determine the right of the Commonwealth of Pennsylvania to insist on compliance with its procedural rules, as well as the rights of Charles Edward Whiting; and to clarify the meaning and future application of the ruling of *Henry v. Mississippi* to innumerable cases, the petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Appendix A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 15582

COMMONWEALTH OF PENNSYLVANIA *ex rel.*
CHARLES E. WHITING,

v.

A. C. CAVELL, Superintendent, State Correctional Institution at Rockview, Bellefonte, Pa.,
Appellant

No. 15623

COMMONWEALTH OF PENNSYLVANIA *ex rel.*
CHARLES E. WHITING,
Appellant

v.

A. C. CAVELL, Superintendent, State Correctional Institution at Rockview, Bellefonte, Pennsylvania,
Appellee

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Argued February 11, 1966
Before McLAUGHLIN, FORMAN and GANEY, *Circuit Judges*

OPINION OF THE COURT
(Filed March 3, 1966)

PER CURIAM.

Petitioner had been convicted in the Commonwealth of Pennsylvania, Montgomery County Common Pleas Court of murder and sentenced to life imprisonment. He is now serving that sentence. He filed an application for a writ of habeas corpus in the District Court. It is conceded that he has exhausted his state court remedies. His application stated that his home had been illegally searched and certain blood-stained clothing, allegedly his, had been illegally seized. That clothing was admitted in evidence at the state trial. Such action was rightly held to have been prejudicial by the District Judge. The latter also ruled that there was no evidence that Whiting "voluntarily surrendered his clothes with full knowledge of his rights." Finally, the District Judge from the uncontradicted evidence determined that the search as far as the clothes were concerned "was not incident to a lawful arrest" and that "There is nothing to show it was impracticable to obtain a search warrant." On the issue of search and seizure the Court granted the petition for the writ. Under the facts and the law we must affirm that decision.

There were other grounds urged on behalf of petitioner for the granting of the writ which were denied by the District Court. There is no need or use of passing upon these in view of our above stated conclusion.

The judgment of the District Court granting the petition for a writ of habeas corpus on the basis of illegal search and seizure will be affirmed.